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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN A. CHAPMAN, JR.,

Defendant-Appellant.

No. 08-7976

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
William D. Quarles, Jr., District Judge.
(1:03-cr-00301-WDQ-1; 1:08-cv-01268-WDQ)

Argued: December 1, 2009

Decided: January 29, 2010

Before TRAXLER, Chief Judge, and WILKINSON and MICHAEL, Circuit Judges.

Affirmed by published opinion. Chief Judge Traxler wrote the majority opinion, in which Judge Wilkinson joined. Judge Michael wrote a separate opinion concurring in the judgment.

COUNSEL

ARGUED: Lartease Martrell Tiffith, KIRKLAND & ELLIS, LLP, Washington, D.C., for Appellant. Jefferson McClure Gray, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF**: Rod J. Rosenstein, United States Attorney, Baltimore, Maryland, for Appellee.

OPINION

TRAXLER, Chief Judge:

After being convicted of numerous charges, including mail and wire fraud, *see United States v. Chapman*, No. 04-5010, 2006 WL 3539146 (4th Cir. Dec. 8, 2006), Nathan Chapman filed a motion under 28 U.S.C.A. § 2255 challenging his convictions on several grounds. The district court denied relief. We granted a certificate of appealability to permit Chapman to appeal the district court's rejection of his claim that trial counsel was ineffective for ignoring Chapman's direction to accept the district court's offer of a mistrial. For the reasons set forth below, we affirm.

I.

Chapman was the chief executive officer and majority shareholder of various financial services companies, and a portion of the charges against Chapman involved his use of "business development funds" provided by these companies for personal rather than business purposes. The government's theory of the case was that Chapman needed the business development funds to support a lifestyle that he could not otherwise afford. The trial court permitted the government to present, as proof of Chapman's motive, *see* Fed. R. Evid. 404(b), evidence of substantial loans (eventually totaling more than $1 million) that Chapman took from his companies but never repaid.

After the government's rebuttal closing argument, counsel for Chapman objected to a reference by the government to the loans, believing the reference went beyond the limitations the trial

court had placed on the use of the loan evidence. The trial court stated that counsel "might be right," J.A. 20, and directed counsel for Chapman to draft a curative instruction to be given to the jury. Counsel for Chapman then, "just for the record," moved for a mistrial with prejudice. J.A. 20. The trial court offered to grant Chapman a mistrial *without* prejudice, but counsel for Chapman declined, insisting that the mistrial should be with prejudice. The case proceeded, and the trial court gave the curative instruction to the jury. The jury ultimately convicted Chapman on 22 of the charges alleged in the indictment.

In his § 2255 motion, Chapman contended that when the trial court offered to grant a mistrial without prejudice, he instructed his attorney to accept the offer. Chapman argued that his attorney, by rejecting his instructions to accept the mistrial, was constitutionally ineffective and that Chapman was therefore entitled to a new trial. The district court rejected Chapman's claim, concluding that the decision to go forward with the trial rather than accept a mistrial without prejudice was a tactical decision to be made by counsel, not Chapman.

II.

A criminal defendant's right to counsel as guaranteed by the Sixth Amendment is, of course, a guarantee of the right to *effective* assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984). To succeed on a Sixth Amendment claim of ineffective assistance of counsel, "the defendant must show that his counsel's performance 'fell below an objective standard of reasonableness' in light of the prevailing professional norms." *Lawrence v.*

Branker, 517 F.3d 700, 708 (4th Cir. 2008) (quoting *Strickland*, 466 U.S. at 688). If the defendant can establish that his attorney's performance was deficient, the defendant must then demonstrate that "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Chapman's ineffective-assistance claim is a narrow one. Chapman does not argue that, given the manner in which the trial had unfolded, the only reasonable decision was to accept the mistrial offer. Nor does Chapman argue that counsel should have consulted with him before rejecting the mistrial offer. Instead, Chapman contends only that counsel's performance was deficient because counsel ignored Chapman's instructions to accept the mistrial offered by the trial court. The government, however, argues that decisions involving mistrials—whether to ask for a mistrial and whether to accept an offer of a mistrial—are tactical decisions that must be made by the attorney, not the defendant. Because the decision belongs to the attorney, the government argues that Chapman's disagreement with the decision made by counsel is simply irrelevant.* We agree with the government.

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* The government seems to challenge the factual underpinnings of Chapman's claim, questioning whether the trial court was serious in its offer of a mistrial and noting that one of Chapman's trial attorneys stated in an affidavit that he consulted with Chapman about the mistrial and that Chapman agreed with his decision. Because the district court rejected Chapman's claims without holding an evidentiary hearing, we

It is by now well-established that in a criminal trial, defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004). "Decisions that may be made without the defendant's consent primarily involve trial strategy and tactics, such as what evidence should be introduced, what stipulations should be made, what objections should be raised, and what pre-trial motions should be filed." *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998) (internal quotation marks omitted). However, "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Nixon*, 543 U.S. at 187.

The only decisions that have been identified by the Supreme Court as belonging exclusively to the defendant are "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Jones v. Barnes*, 463 U.S. 745, 751 (1983). The Supreme Court has never suggested that decisions about mistrials are "of such a moment" that they can be made only by the defendant himself, and every circuit to consider the question has concluded that decisions regarding mistrials belong to the attorney, not the client. *See United States v. Burke*, 257 F.3d 1321, 1324 (11th Cir. 2001) ("We ... reject Defendant's contention that the decision to request a

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must review the facts in the light most favorable to Chapman. *See United States v. Poindexter*, 492 F.3d 263, 267 (4th Cir. 2007).

mistrial is a fundamental decision that only a defendant can make."); *United States v. Washington*, 198 F.3d 721, 723 (8th Cir. 1999) ("Washington argues that the defendant must be allowed to make the ultimate decision on whether to request a mistrial. We disagree and hold that the decision to make such a request is a strategic decision for counsel."); *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996) ("[W]here ... defense counsel consents as a matter of trial strategy to a mistrial, that consent binds the defendant ..., regardless of whether the defendant participates in the decision."); *Galowski v. Murphy*, 891 F.2d 629, 639 (7th Cir. 1989) ("The decision whether to move for a mistrial or instead proceed to judgment with the expectation that the client will be acquitted is a matter of trial strategy."). As the Eighth Circuit explained,

> the decision to move for a mistrial often must be made in a split-second and it involves numerous alternative strategies such as remaining silent, interposing an objection, requesting a curative instruction, or requesting an end to the proceeding. Moreover, counsel is generally in a better position than a lay person to judge the impact of a potentially prejudicial incident in the context of the entire trial.

Washington, 198 F.3d at 724 (citation omitted).

We likewise conclude that decisions regarding a mistrial are tactical decisions entrusted to the sound judgment of counsel, not the client. Preliminarily, we note that mistrial issues bear no similarity, in nature or significance, to the decisions that the Supreme Court has identified as belonging solely to

the defendant. Moreover, deciding whether to seek a mistrial (or whether to accept or reject a mistrial offered by the trial court) involves an on-the-fly balancing of the probable damage caused by the trial error against the likelihood that a different jury might be more inclined to acquit—a question that itself requires considering how receptive the current jury is to the defendant, whether key witnesses have testified as anticipated, etc. Given the many issues that must be identified, evaluated, and weighed when determining whether to seek or accept a mistrial, we think it clear that the decision is a tactical one to be made by counsel, not the client.

As noted above, Chapman does not contend otherwise—that is, he does not argue that decisions regarding mistrials are so fundamental that they must be made by the client rather than the attorney. Chapman nonetheless insists that if a mistrial is offered by the trial court *and* the defendant expresses his opinion on whether the offer should be accepted, counsel is obligated to follow the defendant's instructions. We disagree.

A criminal defense attorney is obligated to follow his client's wishes only with regard to the fundamental issues that must be personally decided by the client. As to those limited issues—pleading guilty, waiving a jury, taking the stand, and appealing a conviction or sentence—"an attorney must both consult with the defendant and obtain consent to the recommended course of action." *Nixon*, 543 U.S. at 187. If the decision is a tactical one left to the sound judgment of counsel, the decision must be just that—left to the judgment of counsel. Counsel need not consult with the client

about the matter or obtain the client's consent. *See id.* (The "duty to consult with the client regarding important decisions ... does not require counsel to obtain the defendant's consent to every tactical decision." (internal quotation marks omitted)); *Sexton*, 163 F.3d at 885 (whether to file a motion to suppress "is a classic tactical decision" for which consent from the defendant was not required).

And if consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client. For example, which witnesses to call is a classic tactical decision left to counsel, *see Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008) ("[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney."), and it remains a decision for counsel even when the client disagrees, *see Blanco v. Singletary*, 943 F.2d 1477, 1495 (11th Cir. 1991) ("[T]he trial court overreached its authority and infringed upon the relationship between Blanco and his attorneys by requiring defense counsel to call two additional witnesses [as requested by the defendant]. Generally, trial tactics are for defense counsel to formulate. The decision as to which witnesses to call is an aspect of trial tactics that is normally entrusted to counsel." (footnotes omitted)). Likewise, we believe that whether to seek or accept a mistrial is a matter left to the sound judgment of counsel, even if the client disagrees with counsel's decision. *See Burke*, 257 F.3d at 1324 ("[T]he decision to refrain from asking the court for a mistrial is a tactical decision entrusted to defense counsel, binding the defendant *even when the*

defendant expressed a contrary wish to his lawyer." (emphasis added)). The reasonableness of the tactical decision actually made by counsel is of course subject to challenge, but the decision is not unreasonable simply because the client expressed a contrary view.

Chapman, however, views his position as a necessary consequence of the agency relationship between the defendant and his attorney:

> [A]s defendant's counsel and agent, defense counsel is permitted to make decisions that bind the defendant as agents generally do with regard to matters within the scope of their authority. However, that authority is binding only unless and until revoked. When the defendant specifically instructs his agent to accept a court's offer of a mistrial on his behalf, to the extent that the defendant's request is reasonable, defense counsel as his agent is obligated to do so—his agency to do otherwise is revoked.

Brief of Appellant at 19. While it is of course true that an attorney is the agent of his client, the attorney's obligations in a criminal case do not precisely mirror the obligations of a general agent representing his principal on civil matters. Notwithstanding the fact that an agent is generally authorized to act for the principal in all matters within the scope of the agent's authority, the law requires the criminal defendant, not his attorney, to make the critical decisions about whether to plead guilty or go to trial, whether to testify, and whether to appeal. And notwithstanding the fact that a principal generally has the authority to dictate the

manner in which his agent will carry out his duties, the law places certain tactical decisions solely in the hands of the criminal defense attorney. This reallocation of rights and duties is necessary to give effect to the constitutional rights granted to criminal defendants and to insure the effective operation of our adversarial system, where defense attorneys must protect the interests of their clients while also serving as officers of the court. *See Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial. The adversary process could not function effectively if every tactical decision required client approval." (footnote omitted)). As the Eleventh Circuit has explained,

> Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point. He is an officer of the court and a professional advocate pursuing a result—almost always, acquittal—within the confines of the law; his chief reason for being present is to exercise his professional judgment to decide tactics.
>
> .... When the defendant is given the last word about how his case will be tried, the defendant becomes his own trial lawyer. If we add to the list of circumstances in which a defendant can trump his counsel's decision, the adversarial system becomes less effective as the opinions of lay persons are substituted for the judgment of legally trained counsel. The sound

> functioning of the adversarial system is critical to the American system of criminal justice. We intend to defend it.

Burke, 257 F.3d at 1323. We therefore reject Chapman's claim that an attorney loses the right to make tactical decisions about the conduct of a criminal trial if the client expresses disagreement with the attorney's decision.

III.

To summarize, we conclude that decisions involving mistrials—whether to seek a mistrial or accept a mistrial offered by the trial court—are tactical decisions left to the sound judgment of counsel. The decision remains counsel's to make even if the client expresses disagreement with the decision, and counsel's decision is not unreasonable simply because the client disagrees. The district court therefore properly rejected Chapman's claim that his attorney provided constitutionally ineffective assistance of counsel by refusing, over Chapman's instructions to the contrary, the trial court's offer of a mistrial without prejudice. Accordingly, we hereby affirm the district court's order denying Chapman's § 2255 motion.

AFFIRMED

MICHAEL, Circuit Judge, concurring in the judgment:

I concur in the judgment but write separately to express my belief that we should be resolving this case on much narrower grounds. As the majority recognizes, "Chapman's ineffective-assistance claim is a narrow one." *Ante* at [4a]. Chapman simply argues that under the particular circumstances of this case, he received ineffective assistance when his lawyer refused to follow his express instruction to accept the district court's offer of a mistrial without prejudice. Instead of affirming on the narrow ground that Chapman's lawyer acted reasonably, the majority sweeps broadly and decides that a lawyer's decision to refuse a mistrial over his client's wishes and without consultation can never constitute ineffective assistance. I believe such a broad rule is both ill-advised and unnecessary to resolve this case.

There are at least three types of decisions where counsel's failure to seek or follow client input before acting could result in constitutionally ineffective assistance: (1) fundamental decisions requiring informed consent from the client; (2) important decisions requiring consultation with the client; and (3) decisions where the client has expressly instructed counsel on a particular course. *See Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Gov't of the Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1437 (3d Cir. 1996). The majority has focused exclusively on the first type, that is, the fundamental decisions described in *Jones*. Nothing in this case has convinced me that the list of fundamental decisions in *Jones* should be expanded. But focusing

exclusively on the fundamental decision category inappropriately ignores the other two categories. In *Florida v. Nixon* the Supreme Court expressly recognized counsel's "duty to consult with the client regarding *important* decisions" as independent from the duty to both consult with the client *and* obtain his consent on *fundamental* decisions. 543 U.S. at 187 (emphasis added). The majority misreads this very portion of *Nixon* to support the proposition that for non-fundamental decisions "[c]ounsel need not consult with the client about the matter *or* obtain the client's consent." *Ante* at [7-8a] (emphasis added). There will be important decisions that require consultation with, but not consent from, the client. *See, e.g.*, *Weatherwax*, 77 F.3d at 1436 (duty to consult with client concerning possible mistrial motion after client's family raised fact that juror was reading prohibited materials). Similarly, there will be decisions on which counsel and client disagree that will at least require some form of accommodation. *See, e.g.*, *United States v. Gillis*, 773 F.2d 549, 560 (4th Cir. 1984) (defendant's right to self-representation on appeal satisfied by allowing him to submit supplemental brief).

In assessing counsel's failure to consult with his client or follow an express instruction, I would follow the Third Circuit's analysis in *Weatherwax*. There, the court held that "[t]he constitutional duty to consult regarding issues on which counsel has the last word requires only that counsel act reasonably in light of the circumstances and what is likely to be accomplished by a consultation." 77 F.3d at 1437. In assessing reasonableness, the Third Circuit weighed the lawyer's actions against the "number of important purposes" served by the duty to consult,

including ensuring the client's ability to assist in his own defense, promoting open lawyer-client communications, and safeguarding the client's right to forgo his current representation if he disagrees with his lawyer. *Id.* at 1436-37. The reasonableness assessment is, of course, fact intensive and case specific.

I conclude that while the decision whether to accept a mistrial offered by the court will sometimes require a lawyer to consult with his client, it was nevertheless reasonable here for Billy Martin to refuse the offer against Chapman's expressed wishes and without consultation. The record does not indicate that Chapman even understood the difference between a mistrial with prejudice and a mistrial without prejudice, let alone the consequences of each in his case. Under these circumstances, *following* Chapman's instruction might well have constituted ineffective assistance of counsel. A closer question is whether Martin should have asked the court for time to consult with Chapman concerning the offer, but I again conclude that Martin's actions were reasonable. The district court was demanding an answer from Martin then and there. Martin had to make a decision on the fly, and there is no evidence that consultation would have prompted Chapman to hold his position and request new counsel.

I would not foreclose the possibility that, in other situations, counsel's failure to consult with his client or follow his express, informed wishes would constitute constitutionally ineffective assistance. Because I agree with the majority that counsel was

effective in Chapman's case, however, I concur in the result.

FILED: MARCH 30, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN A. CHAPMAN, JR.,

Defendant-Appellant.

No. 08-7976
(1:03-cr-00301-WDQ-1)
(1:08-cv-01268-WDQ)

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Wilkinson and Judge Michael.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: MAY 21, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NATHAN A. CHAPMAN, JR.,

Defendant-Appellant.

No. 08-7976
(1:03-cr-00301-WDQ-1)
(1:08-cv-01268-WDQ)

ORDER

Before this court is Nathan A. Chapman, Jr.'s request for a certificate of appealability to appeal the district court's order denying Chapman's post-conviction motion to vacate judgment filed pursuant to 28 U.S.C.A. § 2255 (West Supp. 2008). We have reviewed the record on appeal and GRANT a certificate of appealability on Chapman's claim that his counsel was ineffective for ignoring his direction to accept the district court's offer of a mistrial without prejudice after the prosecution made inappropriate comments to the jury. We DENY a certificate of appealability on all other issues and dismiss Chapman's appeal therefrom.

For the Court

/s/ Patricia S. Connor, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

NATHAN A. CHAPMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO.: WDQ-03-0301

CRIMINAL NO. : WDQ-08-1268

MEMORANDUM OPINION

Pending is Nathan A. Chapman, Jr.'s *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The Court has reviewed the papers and the record and determined that no evidentiary hearing is necessary. *See* Rule 8 of the Rules Governing § 2255 Proceedings. For the following reasons, Chapman's motion will be denied.

I. Background

On August 12, 2004, a jury found Chapman guilty on 23 counts of wire fraud, mail fraud, false statement to a federal government agency, investment advisory fraud, false statement on tax returns, and aiding and abetting.[1] On November 1,

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[1] The jury acquitted Chapman of seven counts of wire fraud, mail fraud, false statement on tax returns, false statement in connection with loan application, and engaging in monetary transactions in property derived from specific unlawful activity.

2004, Chapman was sentenced to 90 months imprisonment, three years of supervised release, restitution of $5,000,856, and a special assessment of $2,300.

On December 8, 2006, the Fourth Circuit affirmed Chapman's conviction, but remanded for resentencing in accord with *United States v. Booker*, 543 U.S. 220 (2005). *United States v. Chapman*, 209 F. App'x 253 (4th Cir. Dec. 8, 2005).[2] On May 14, 2007, the Supreme Court denied certiorari. *Chapman v. United States*, 127 S. Ct. 2286 (2007).

On May 14, 2008, Chapman filed this motion to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255.

II. Analysis

A. Standard of Review

The Sixth Amendment guarantees the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prove ineffective assistance of counsel, Chapman must show that: (1) counsel's deficient performance (2) prejudiced his defense. *Id.* at 687. Chapman must establish that counsel made errors so serious that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Chapman must also demonstrate a "reasonable probability that, but for counsel's

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The jury hung on two other counts of false statement on tax returns.

[2] On February 20, 2007, Chapman was resentenced to 63 months imprisonment.

unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Judicial scrutiny of attorney performance asks whether counsel's assistance was reasonable under the circumstances. *Id.* at 689.

B. Discussion

1. *Batson* Challenge

Chapman argues that his trial counsel was ineffective because he failed to raise properly a *Batson* objection to the Government's peremptory challenges and preserve the issue for appeal. The Government counters that the *Batson* challenge was reviewed by the trial Court and the Fourth Circuit.

The Government may not use its peremptory challenges to exclude minority jurors solely because of their race. *Batson v. Kentucky*, 476 U.S. 79, 91-92 (1986). Chapman's counsel raised *Batson* objections at trial, and the Court considered and overruled them. Trial Tr. vol. 1, 189-94, June 14, 2004. The Fourth Circuit affirmed because there was no evidence that the Government struck jurors based on their race. *Chapman*, 209 F. App'x at 261-64.

Absent evidence of the Government's racial animus or racially tainted verdicts, Chapman has not shown that he was prejudiced by his counsel's allege deficient performance. *See Nickerson v. Lee*, 971 F.2d 1125, 1136 (4th Cir. 1992) (more allegations unsupported by evidence are not enough to show prejudice on an ineffective assistance of counsel claim;, *abrog'n on other grounds recog'd, Yeatts v. Angelone*, 166 F.3d 255 (4th Cir. 1999).

2. Decision Not To Request a Mistrial

Chapman directed his lawyer to move for mistrial; he argues that counsel was ineffective when he ignored that direction. The Government counters that counsel made a tactical decision that did not prejudice Chapman.

Attorneys have a duty to consult with their clients on important decisions about the case, but not on "'every tactical decision.'" *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (*quoting Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988)). Counsel generally has superior knowledge of a defendant's case and the criminal legal process, and is therefore in a better position to make tactical decisions. *Sexton v. French*, 163 F.3d 874, 885 (4th Cir. 1998). The only decisions on which a client *must* be consulted as a matter of law are "'whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal.'" *Nixon*, 543 U.S. at 187 (*quoting Jones v. Barnes*, 463 U.S. 745, 751 (1983)); *Sexton*, 163 F.3d at 885.

Whether an attorney pursues a mistrial does not require client approval. *United States v. Burke*, 257 F.3d 1321, 1324 (11th Cir. 2001) ("[T]he decision to refrain from asking the court for a mistrial is a tactical decision entrusted to defense counsel, binding the defendant even when the defendant expressed a contrary wish to his lawyer."); *United States v. Washington*, 198 F.3d 721, 723 (8th Cir. 1999); *Watkins v. Kassulke*, 90 F.3d 138, 143 (6th Cir. 1996); *Galowski v. Murphy*, 891 F.2d 629, 639 (7th Cir. 1989).

Chapman's counsel moved for a mistrial with prejudice because the prosecutor asked the jury to

consider certain loans and use of a credit card in deciding whether Chapman breached a fiduciary duty, after the Court had ruled that the evidence was not admissible for that purpose. Trial Tr. vol. 27, 189, July 29, 2004. The Court agreed that the comment was improper and offered to grant a mistrial without prejudice. *Id.* 189-190. Wanting only a mistrial with prejudice, counsel chose to continue the trial.[3] Chapman's counsel determined in his professional judgment that going forward with that jury was the "reasonable and prudent course of action."[4] William R. Martin Aff. ¶ 6, July 22, 2008. Chapman's counsel was within his discretion as attorney to move forward with the case, even though it was against Chapman's wishes.[5]

Further, Chapman has failed to show prejudice. He has not demonstrated that trial before a different jury would have ended with this acquittal.

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[3] According to counsel, Chapman concurred in the decision to continue with trial, in part because of recent publicity that he thought would be favorable to his case. Martin Aff. ¶ 5.

[4] Chapman's counsel also conferred with the other defense counsel before deciding to move forward with the case. Martin Aff. ¶ 5.

[5] Chapman has submitted an affidavit by his counsel, Nathaniel E. Jones, Jr., that 1) when the Court asked defense counsel if he wanted a mistrial he heard Chapman tell counsel that he wanted a mistrial, and 2) there was no discussion between defense counsel and Chapman about whether to accept a mistrial before counsel's decision to move forward in the case. Nathaniel E. Jones Aff. ¶ 3, May 13, 2008. As noted, defense counsel has the discretion to seek a mistrial and was not required to consult with the defendant about the decision.

Strickland, 466 U.S. at 694. As a result, Chapman's second claim of ineffective assistance of counsel must fail.

III. Conclusion

For the reasons discussed above, Chapman's motion will be denied.

August 18, 2008
Date

/s/
William D. Quarles, Jr.
United States District Judge

MOTION UNDER 28 USC § 2255 TO VACATE, SET ASIDE, OR CORRECT SENTENCE BY A PERSON IN FEDERAL CUSTODY

* * *

INTRODUCTION

My name is Nathan A. Chapman, Jr. I am petitioning the Court under 28 USC § 2255. I am presently incarcerated at FCI Morgantown in Morgantown, West Virginia.

At my trial and sentencing at District Court and during my appeal to the 4th Circuit Court I was represented by William R. Martin, partner at Blank Rome in Washington D.C. He later left Blank Rome and joined the firm of Sutherland Asbill Brennan, also in Washington, D.C. As a partner of this firm he represented me at my resentencing.

* * *

Ground Two: Denial of Effective Assistance of Counsel

On July 29th, after and as a result of the Government's closing argument, my Defense Counsels, Mark Rothenburg and William Martin moved a Motion for a Mistrial.

Judge Quarles indicated to my defense counsel, William Martin, that he was prepared to grant the mistrial motion. He asked Mr. Martin if he wanted a mistrial. At this point the Judge's gavel was raised indicating that he was prepared to grant a mistrial. I immediately told my counsel, Mr. Martin, Yes!, indicating my instructions to accept the mistrial. My instructions were said loud enough to be heard by those in attendance at my trial.

I have enclosed a statement from Mr. Nat Jones, one of my defense counsels, as evidence that he heard my statement of "yes" to Judge Quarles offer to grant a mistrial. I have also enclosed a copy of the appropriate section from the court record.

Under *Strickland v. Washington* (104 S.Ct. 2052) Mr. Martin had a "duty to consult with the Defendant on important decisions." This is especially true when I had already indicated in public court my wishes.

In *Ro[e] v. Flores-Ortega* (120 St. [1029,] 1038) the Court defined the term consult to mean "advising the Defendant about the advantages and disadvantages of making an appeal and make a reasonable effort to discover the client's wishes." Neither did Mr. Martin nor Mr. Rothenburg consult with me at all before making this series of important decisions. These decisions were contrary to my publicly expressed wishes.

Under *Staples v. DeCoster* (1973, App. DC) 159 US App. DC 326, 487 42d 1197, *"Duties of counsel to client in order to constitute reasonably competent assistance are to confer with client as often as necessary to ascertain potential defenses and discuss fully potential strategies and tactical choices, to advise the client of his rights and take all actions necessary to preserve them*, to make appropriate motions, to conduct appropriate factual investigations and to do adequate legal research, *substantial violation of any of these requirements can result in denial of effective representation.*

Since defense counsels had not discussed with me in advance their intention to move a mistrial, when Judge Quarles offered to grant the mistrial defense

counsels should have accepted it as I publicly expressed.

Barring that they should have requested an opportunity to consult with me. During which time they had a duty to explain to me the advantages and disadvantages of a mistrial and to ascertain my wishes.

Further if they had in mind accepting a mistrial if it was granted "with prejudice," they should have explained what "with prejudice" meant to me and how it affected a mistrial and my future rights. Defense counsels had a duty to explain to me the advantages and disadvantages of a "mistrial with prejudice" and ascertain my wishes.

This is especially true since defense counsels did the exact opposite of my publicly expressed wishes.

I was prejudiced by Mr. Martin's and Mr. Rothenburg's ineffectiveness by their failure to comply with their duty to consult with me on important decisions under *Strickland v. Washington*, *Ro[e] v. Flores-Ortega* and *United States v. DeCoster*. I was further prejudiced by Mr. Martin's failure to follow my publicly expressed wish to accept Judge Quarles mistrial offer.

It is important to note that defense counsel felt that the issue of the prosecutor comments was so important that it was included as an issue on my appeal. Yet, at the end of the Government's rebuttal closing argument he failed to accept Judge Quarles offer of a mistrial.

Further support of Defendant counsel ineffectiveness was the fact that he requested Judge Quarles to declare a mistrial with prejudice. I have

come to discovery the basis of a mistrial with prejudice. I do not believe that the facts in my case met the legal elements which have allowed Judge Quarles to declare a mistrial with prejudice.

My defense counsels were ineffective. It resulted in my being prejudiced by not receiving the mistrial which Judge Quarles offered and I indicated that I wished and instructed defense counsel to accept.

AFFIDAVIT

I, Nathaniel E. Jones, Jr., am an attorney admitted to practice law in the State of Maryland, and one of the defense counsel for Nathan A. Chapman, Jr. in the criminal trial of *United States v. Nathan A. Chapman, Jr.*, tried in the United States District Court for the District of Maryland (Baltimore), Case No. WDQ-03-0301, during the period June 14, 2004 through August 12, 2004, although not counsel of record, and not counsel at the defense table during the trial.

I was present in the courtroom on the day of the Motion for Mistrial, and the colloquy related thereto between Judge Quarles and Mr. William Martin and Mr. Marc Rothenberg, defense counsel for Chapman, on July 29, 2004, which is the subject of Ground Two of Mr. Chapman's § 2255 Motion.

When Judge Quarles stated that he was prepared to grant a mistrial and inquired of Mr. Martin if Mr. Martin wanted him to grant a mistrial, I heard Mr. Chapman say "yes" to his counsel, Mr. Martin. I was seated in the first row of the gallery behind the defense table, approximately eighteen feet away. Mr. Chapman's vocalization of "yes" was loud enough for me to clearly hear him from my location. There was no discussion between Mr. Chapman and his defense counsel regarding whether or not to accept Judge Quarles' offer to grant a mistrial.

I HEREBY SOLEMNLY DECLARE AND AFFIRM UNDER THE PENALTIES OF PERJURY AND UPON PERSONAL KNOWLEDGE THAT THE FOREGOING STATEMENTS ARE TRUE AND CORRECT.

Dated 5/13/2008 /s/
Nathaniel E. Jones, Jr. Esq.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, NORTHERN DIVISION

UNITED STATES OF AMERICA,

v.

NATHAN A. CHAPMAN, JR.,

Defendant

Criminal No.: WDQ-03-0301
Baltimore, Maryland
July 29, 2004
9:15 a.m.
(Volume XXVII)

THE ABOVE-ENTITLED CASE CONTINUED ON FOR TRIAL BEFORE THE HONORABLE WILLIAM D. QUARLES, JR., UNITED STATES DISTRICT JUDGE

APPEARANCES

On behalf of the Government:
JEFFERSON GRAY, AUSA
CRAIG WOLFF, AUSA

On behalf of the Defendant:
WILLIAM MARTIN, ESQUIRE
MARC ROTHENBERG, ESQUIRE
ALLISON FENNELL, ESQUIRE

Reported by:
Martin J. Giordano, RMR, CRR
Official Court Reporter
101 West Lombard Street
Room 3318
Baltimore, Maryland 21201
410-962-4504

* * *

MR. ROTHENBERG: Your Honor, we do have one issue before the jury comes in, if we could—

MR. MARTIN: Marshal?

THE MARSHAL: Do what?

THE COURT: Hold on for a moment. Yes?

MR. ROTHENBERG: Your Honor, the issue—Your Honor, an issue came up—just wait until the door is closed.

During Mr. Gray's rebuttal argument, he specifically made the argument to the jury that they should consider the loans and the credit card for a breach of fiduciary duty, and that goes afoul of the Court's ruling at the beginning of this case as to what the loans would be used for in this case. They were not going to be allowed to argue that they were part of any criminal scheme. Rather, the loans—

THE COURT: I tell you what. You might be right. Draft a curative instruction. I'll be glad to give it to the jury. Can you ask them to come in?

MR. ROTHENBERG: And, just for the record, we are moving for a mistrial based upon that.

THE COURT: You want one?

MR. ROTHENBERG: With prejudice.

THE COURT: Nope. I'll give you a mistrial without one if you want one. I give mistrials regularly. If you want a mistrial, you'll get one.

MR. ROTHENBERG: We're just preserving the record, and wanting one with prejudice, Your Honor.

THE COURT: No. If you want a mistrial, don't play with me on that, because I'll give you a mistrial.

I have noting to do but be here again. If you want to try this at your client's expense again—do you want a mistrial?

MR. MARTIN: No, Your Honor.

THE COURT: I'm sorry. You want a mistrial?

MR. MARTIN: Only with prejudice. If your Honor would consider with prejudice—

THE COURT: No, no, no. I'll give you one without prejudice if you want.

MR. MARTIN: No, Your Honor.

THE COURT: Okay. Granting it would be worth it just to see the look on Mr. Gray's face.

(Laughter.)

MR. MARTIN: If I said that, he'd be upset with me, Judge.

(Jury enters.)

THE COURT: Good afternoon, ladies and gentlemen.

* * *